

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOTICE OF APPEAL**

Use this form only for an appeal from a final judgment of a Circuit Court.

ATTACH COPIES OF ALL ORDERS BEING APPEALED

1. COMPLETE CASE TITLE AND CASE NUMBERS IN CIRCUIT COURT

(Include all party designations, such as plaintiff, intervenor, etc. Use an extra sheet if necessary.)

MarkWest Liberty Midstream & Resources, LLC, Plaintiff, v. J.F. Allen Company; AMEC Foster Wheeler

Environment & Infrastructure, Inc., Redstone International, Inc., Civil & Environmental Consultants, Inc., and Coastal Drilling East, LLC.

Civil Action No. 16-C-82

2. COUNTY APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

(If the presiding judge was appointed by special assignment, include an explanation of the circumstances on an extra sheet.)

Circuit Court of Wetzel County, West Virginia, Business Court Division

Hon. H. Charles Carl, III, Judge, presiding

3. PETITIONER(S) (List all parties who join in the petition for appeal and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

Redstone International, Inc.

Michael Jacks, Jacks Legal Group, PLLC, 3467 University Ave, Ste. 200, Morgantown, WV 26505

304-599-4770, 304-278-3187 (fax), mike@jackslegal.com

4. RESPONDENT(S) (List all parties against whom the appeal is taken and provide the name, firm name, address, phone number, and e-mail address of counsel of record for each party. Self-represented parties must provide an address and telephone number.)

JF ALLEN, Jeffrey M. Wakefield, Flaherty, PLLC; 200 Capitol St, Charleston, WV, 25301; 304-347-42331,

jwakefield@flahertylegal.com; AMEC, Vic L. McConnell, Smith Cashion & Orr, PLC, 3100 West End Ave., Suite

800, Nashville, TN 37203; 615-742-8580, VMcConnell@smithcashion.com; MARKWEST, Joseph M. Ward, Frost

Brown Todd, LLC, 500 Virginia St, E, Unit 1100, Charleston, WV 25301; 304-345-0111, jward@fbtlaw.com

5. NON-PARTICIPANT(S) (List any parties to the lower court action that will not be involved in the appeal and provide the name, firm name, address, telephone number and e-mail address of counsel of record for each non-participant. Provide the name, address and telephone number of any self-represented litigant who was a party to the lower court action but is not participating in the appeal.)

Civil & Environmental Consultants, Inc., Damon Thomas, Bowles Rice, 1800 Main St. Ste 200, Canonsburg, PA

15317, 724-514-8944, dthomas@bowlesrice.com; Coastal Drilling East, LLC, Steve Gandee, Robinson & McElwee,

140 W. Main St., Clarksburg, WV 26301, 304-326-5313, sfg@ramlaw.com; Lane Construction, Traci Wiley,

MacCorkle Lavender, 300 Summers St. Ste 800, Charleston, WV 25332, 304-344-5600, twiley@mlclaw.com

SHORT CASE NAME: MarkWest v. J.F. Allen, et al.

6. Date of Entry of Judgment: 10 / 18 / 2021

Date of Entry of Judgment on Post-Trial Motions, if any:

(1) / / (2) / / (3) / /

7. CRIMINAL CASES:

Defendant's Sentence:

Bail Status:

n/a

8. ABUSE AND NEGLECT CASES: On an extra sheet, provide a list of the names, ages, and parent's names of all minor children, a brief description of the current status of the parental rights of each parent as of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case.

9. Is the order or judgment appealed a final decision on the merits as to all issues and all parties? ☒ YES / ☐ NO

If your answer is no, was the order or judgment entered pursuant to R. Civ. P. 54(b)? ☐ YES / ☐ NO

If your answer is no, you must attach a brief explanation as to why the order or judgment being appealed is proper for the Court to consider.

10. Has this case previously been appealed? ☐ YES / ☒ NO

If yes, provide the case name, docket number and disposition of each prior appeal.

11. Are there any related cases currently pending in the Supreme Court or in a lower tribunal? ☐ YES / ☒ NO

If yes, cite the case, provide the status, and provide a description of how it is related.

12. Is any part of the case confidential? ☐ YES / ☒ NO

If yes, identify which part and provide specific authority for confidentiality.

13. If an appealing party is a corporation, an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable to the appealing party, please so indicate below.

☒ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

14. Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case?

☐ YES / ☒ NO If yes, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.

15. Is a transcript of proceedings necessary for the Court to fairly consider the assignments of error in the case?

☒ YES / ☐ NO If yes, you **must** complete the appellate transcript request form on page 5.

16. NATURE OF CASE, RELIEF SOUGHT, and OUTCOME BELOW

(Limit to two double-spaced pages; please attach.)

17. ASSIGNMENTS OF ERROR

Express the assignments in the terms and circumstances of the case, but without unnecessary detail. Separately number each assignment of error and for each assignment:

(1) state the issue;

(2) provide a succinct statement as to why the Court should review the issue.

Limit to eight pages double-spaced; please attach.

18. ATTACHMENTS

Attach to this notice of appeal the following documents in order:

- (1) extra sheets containing supplemental information in response to sections 1 - 14 of this form;
- (2) a double-spaced statement of the nature of the case, not to exceed two pages, as material required by section 16 of this form;
- (3) a double-spaced statement of the assignments of error not to exceed eight pages as required by section 17 of this form;
- (4) a copy of the lower court's decision or order from which you are appealing;
- (5) a copy of any order deciding a timely post-trial motion; and
- (6) a copy of any order extending the time period for appeal.
- (7) the statutory docket fee of \$200 payable by cash, money order, or check or a copy of the lower court's granting of the application for fee waiver in this case. All checks must be made to the order of the State of West Virginia. The statutory docket fee does not apply to criminal appeals, appeals from the Worker's Compensation Board of Review, or original jurisdiction actions.

NOTICE:

You must file a separate affidavit and application anytime your financial situation no longer meets the official guidelines or anytime the court orders you to do so.

SHORT CASE NAME: MarkWest v. J.F. Allen, et al.

CERTIFICATIONS

STATE OF WEST VIRGINIA

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and that the contents of the Notice of Appeal are accurate and complete.

11 / 16 / 2021

Date



Counsel of record or unrepresented party

I hereby certify that on or before the date below, copies of this notice of appeal and attachments were served on all parties to the case, and copies were provided to the clerk of the circuit court from which the appeal is taken and to each court reporter from whom a transcript is requested.

11 / 16 / 2021

Date



Counsel of record or unrepresented party

SHORT CASE NAME: MarkWest v. J.F. Allen, et al.

**SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPELLATE TRANSCRIPT REQUEST FORM**

INSTRUCTIONS

- (1) If a transcript is necessary for your appeal, you must complete this form and make appropriate financial arrangements with each court reporter from whom a transcript is requested.
- (2) Specify each portion of the proceedings that must be transcribed for purposes of appeal. See Rule of Appellate Procedure 9(a).
- (3) A separate request form must be completed for each court reporter from whom a transcript is requested. If you are unsure of the court reporter(s) involved, contact the circuit clerk's office for that information.
- (4) Failure to make timely and satisfactory arrangements for transcript production, including necessary financial arrangements, may result in denial of motions for extension of the appeal period, or may result in dismissal of the appeal for failure to prosecute.

Name of Court Reporter, ERO, or Typist: Susan Landes

Address of Court Reporter: Circuit Court of Hampshire County

Civil Action No.: _____ **County:** THE TRANSCRIPTS HAVE BEEN PREPARED

Date of Final Order: _____ / _____ / _____

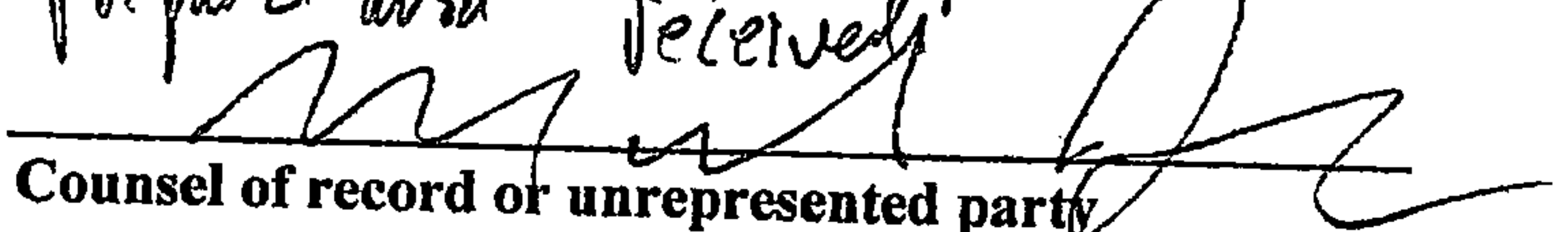
| Date of Proceeding | Type of Proceeding | Length of Proceeding | Name of Judge(s) | Portions Previously Prepared |
|--------------------|--------------------|----------------------|------------------|------------------------------|
| 09 / 21 / 2020 | Trial | 17 days | Carl | ALL |
| 10 / 15 / 2020 | | | | ALL |
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CERTIFICATIONS

I hereby certify that the transcripts requested herein are necessary for a fair consideration of the issues set forth in the Notice of Appeal.

I hereby further certify that I have contacted the court reporter and satisfactory financial arrangements for payment of the transcript have been made as follows:

- ☐ Private funds. (Deposit of \$ _____ enclosed with court reporter's copy. Attach documentation.)
- ☐ Criminal or habeas corpus appeal with fee waiver (Attach order appointing counsel or order providing fee waiver eligibility.)
- ☐ Abuse and neglect or delinquency appeal with fee waiver (Attach order appointing counsel.)
- ☐ Advance payment waived by court reporter (Attach documentation.)

All transcripts have been prepared and received

Counsel of record or unrepresented party

Date mailed to court reporter _____

**Notice of Appeal from MarkWest v. JF Allen, et al., Circuit Court of Wetzel County,
Business Court Division, 16-C-82**

16. Nature of Case, Relief Sought, and Outcome Below

This matter arises from a complex construction dispute involving the owner of a natural gas processing facility in Wetzel County, MarkWest, a general contractor, JF Allen (“JFA”), an engineering and design firm, Amec, and a subcontractor, Redstone International, Inc. (“Redstone”)

To gain more flat space at the facility, MarkWest hired JF Allen, who in turn hired Redstone and Amec, to construct a large retaining wall structure to hold fill material cut from steep slopes in other locations on MarkWest’s property. The base value of the JFA contract was \$12.3 M. Construction began in the fall of 2014 and primary construction completed in 2015, with additional repairs completed in 2016. Litigation began in 2015 after problems arose with the wall. A parallel federal court action, filed in 2015, has been stayed since early 2018.

The parties engaged in extensive discovery after the Circuit Court of Wetzel County referred this matter to Business Court. A seventeen-day bench trial was held in September and October of 2020, and Judge Carl, assigned through the Business Court, issued his decision on October 15, 2021, which was entered by the Circuit Clerk of Wetzel County on October 18, 2021.

The Circuit Court’s Order is extensive, 153 pages long, and cannot be summarized in two pages as to the findings of fact and conclusions of law. The damages awards are summarized below:

| Party Awarded Damages | Reason | Amount | Party Liable for Damages |
|------------------------------|---|----------------|---------------------------------|
| MarkWest | Repairs to Wall (in the future) | \$2,605,596.00 | Amec 60%/ JFA 40% |
| MarkWest | Instrumentation and monitoring of the wall (incurred) | \$701,942.00 | Amec 60%/ JFA 40% |
| MarkWest | Testing and Inspection | \$242,152.00 | Amec 60%/ JFA 40% |

| | | | |
|----------|---|----------------|---------------------------|
| MarkWest | Delay – Lost Profits and impacts to other contractors | \$4,750,712.59 | JFA (partly indemnified) |
| MarkWest | Negligence – Compensatory Damages | \$129,814.10 | Amec |
| JF Allen | Unpaid Contract Balance | \$1,581,405.10 | MarkWest |
| JF Allen | Contractual Overpayment | \$904,438.00 | Redstone |
| JF Allen | Repairs | \$981,673.00 | Redstone |
| JF Allen | Indemnification for MW Lost Profits | \$1,458,342.35 | Redstone |
| JF Allen | Indemnification for MW Lost Profits | \$291, 668.47 | Amec |
| JF Allen | Repairs caused by Design errors | \$695,527.99 | Amec |

MarkWest was awarded \$8,300,402.59 against JFA, offset by the remaining contract balance of \$1,581,405.10 for a total of \$6,718,997.49. MarkWest was awarded \$129,814.10 against Amec. JFA was awarded \$3,117,009.47 against Amec, but the Court found that Amec's contract limited their liability to JFA to \$2 M. JFA was awarded \$3,344,453.35 against Redstone.

Redstone is appealing the damages awarded against it to JFA, and seeks to have those awards reversed for the reasons identified in the assignments of error. Because some of those damages flow through from damages awarded to MarkWest against JFA, Redstone is appealing the delay damages for lost profits awarded to MarkWest. Redstone seeks to have the Court's ruling dismissing its negligence claim against Amec reversed. Redstone seeks to have the Court's "ruling" (there is nothing addressing the claims in the Judgment Order) against its unjust enrichment and *quantum meriut* claims against MarkWest reversed. Redstone also seeks to have the Circuit Court's "Order Granting in Part and Denying in Part Plaintiff's Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest," entered May 7, 2019, which dismissed Redstone's "Failure to Coordinate" claim reversed.

**Notice of Appeal from MarkWest v. JF Allen, et al., Circuit Court of Wetzel County,
Business Court Division, 16-C-82**

17. Assignments of Error

First Assignment of Error

1. Whether the Trial Court erred in dismissing Redstone's negligence claim against Amec on the basis that the special relationship duty allowed the project's owner, MarkWest, to pursue a negligence claim against Amec, but did not allow Redstone, a subcontractor, to pursue a negligence claim for the same engineering and design flaws which impacted its work?

2. Why the Court should review this issue: The special relationship doctrine is grounded in § 552 of the Restatement of Torts and has been described in detail in *Eastern Steel v. City of Salem*, stating "a contractor may assert a negligence cause of action against a design professional seeking purely economic damages even in the absence of privity of contract, that there exists an implied warranty of plans and specifications that inures to a contractor in the absence of a contract." 549 S.E. 2d 266, 268 (2001). Further, in *Eastern Steel*, the Supreme Court held that:

Modern legal authority supports the proposition that if, in the course of its business, [a design professional] negligently obtained and communicated incorrect information specifically known and intended to be for the guidance of [contractors], and if it is specifically known and intended that [the contractors] would rely in calculating their project bids on that information, and if [the contractors] rely thereon to their detriment, then [the design professional] should be liable for foreseeable economic losses sustained by [the contractors] regardless of whether privity of contract exists.

...

Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services.... When they are called upon to provide plans and specifications for a particular job, they must use their skill and care to provide plans and specifications which are sufficient and adequate.... This duty extends to those with whom the design professional is in privity, ... and to those with whom he or she is not....

Id. at 273-274. The Circuit Court's Judgment Order provided no analysis of why Redstone's claim for negligence against Amec was dismissed. It is addressed in paragraph 321, on page 147, in two

sentences, without any details. Elsewhere in the Order, Amec was found to have improperly designed and engineered various aspects of the project, and damages were awarded to MarkWest and JFA against Amec, including under negligence claims. Petitioner Redstone asserts that the Circuit Court abused its discretion in failing to analyze its claim for negligence against Amec and dismissing it out of hand, and failing to award damages to Redstone, and that decision should be reversed.

Second Assignment of Error

1. Did the Circuit Court err by allowing a contractual damages limitation between JFA and Amec to limit damages awarded to JFA against Amec, but ignoring a similar contractual damage limitation between Redstone and JFA?

2. Why the Court should review this issue: The Court struck a significant portion of the damages, more than \$1M, awarded to JFA against Amec because of a contractual damage limitation. Redstone's contract with JFA contained the following language: "Redstone will not be liable for any additional costs, penalties, or back charges due to liquidated, actual, or consequential damages." ... A handwritten note by Mr. Hadjis, JFA's President, to that provision added the following clarifying language: "JFA shall have the right to recover actual damages as a result of acts or omissions by Redstone International which result in financial loss to JFA." The Circuit Court did not analyze or address this contractual provision in the Judgment Order. Two specific categories of damages were clearly waived, "liquidated" and "consequential" damages.

The "lost profits" damages awarded to MarkWest against JFA, which were passed through to Redstone in favor of JFA, are clearly consequential damages. Accordingly, at least \$1,458,342.35 was improperly awarded to JFA against Redstone because the contract barred such recovery, and the Circuit Court abused its discretion by allowing Amec's contractual damage

limitation to protect it, but ignoring Redstone's similar contractual damage limitation. There is no analysis in the Order of this language in Redstone's contract with JFA.

Third Assignment of Error

1. Did the Circuit Court err in determining that Redstone performed defective work on the project?

2. Why the Court should review this issue: The Circuit Court found that Redstone was responsible for \$981,673.00 in repair costs supposedly incurred by JFA during construction for a few anchors that failed to adhere to cement grout in the bond zone that were repaired during construction. Part of Redstone's duties on the project involved drilling, per Amec's design, horizontal anchors into the hill side behind the retaining wall. The wall included approximately 550 such anchors. The Circuit Court held that five such anchors failed in the bond zone, i.e., inside the hill where cement grout was injected around the steel anchor bar to hold it in place.

The five anchors were installed the same as all other anchors on the project, per Amec's design, and could not be tested until JFA placed fill on top of them in the fill zone behind the wall. The anchors failed during testing due to an unforeseen geologically weak area in the hillside, and the presence of excessive ground water. JFA did incur costs excavating fill to install replacement anchors, but Redstone also incurred costs dealing with this unforeseen condition and making repairs. Amec had to change the design for these anchors due to the geology of the area, and changed the anchor's angle from horizontal to declined, and had Redstone install a vertical micropile for additional support of the anchors. These actions were not the fault of Redstone, who installed the anchors as originally designed in an area of weak rock that was an unforeseen condition, and the Circuit Court erred by abusing its discretion to award damages to JFA for this

issue, and as to factual findings, the Circuit Court erred by in awarding unsubstantiated damages numbers created by JFA's expert witness that were clearly in excess of any actual costs incurred.

Fourth Assignment of Error

1. Did the Circuit Court err by finding that JFA had overpaid the contractual money owed to Redstone?

2. Why the Court should review this issue: The Circuit Court accepted, entirely, JFA's expert witness's opinion about the value of Redstone's work, and awarded JFA \$904,438.00 for "overpayment." Redstone asserts the valuation of its work was inaccurate and the Circuit Court's factual findings were clearly erroneous, and the legal conclusions were an abuse of discretion. It was clearly held by the Circuit Court in other sections of the Judgment Order that Amec's faulty design, and JFA's improper placement of fill material, lead to settlement of fill which sheared anchors installed by Redstone. Redstone incurred significant additional costs repairing those anchors. Additionally, the square footage of the wall project grew during construction, and Redstone was entitled to a fair, per square foot adjustment of its contract value for work completed. Petitioner requests that the damage award be reversed, and Redstone's affirmative claim for additional compensation under its valuation of the work, be awarded.

Fifth Assignment of Error

1. Did the Circuit Court err by failing to find that JFA was contractually obligated to indemnify Redstone?

2. Why the Court should review this issue: JFA contractually agreed to indemnify Redstone for a significant range of damages, as follows:

B. Design/Builder [JFA/Amec] waives, and will cause Owner [MarkWest] to waive, all rights against Subcontractor [Redstone], Subsubcontractors, Suppliers and Design/Builder's Consultants and the officers, directors, members, partners, employees and agents, and other consultants and subcontractors of any of each and any of them for:

1. Loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner's or Design/Builder's property or the Work caused by, arising out of or resulting from fire or other peril, whether or not insured by Owner or Design/Builder; and

2. Loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss covered by any property insurance maintained on the completed project or part thereof by Owner during partial utilization pursuant to Paragraph 13.05, after substantial completion pursuant to Paragraph 13.04, or after final payment pursuant to Paragraph 13.07.

Under its contract with MarkWest, JFA was required to purchase insurance for the losses described in the preceding paragraph, i.e. a builder's risk policy. "The contractual liability insurance covers the liability the insured [JFA] assumed under the indemnity and insurance provisions of this Contract." JFA also was required to purchase insurance under Article 5 of the Redstone subcontract. "Design/Builder shall provide property insurance upon the Work at the Site in the amount of the full replacement cost thereof."

Accordingly, all of the contractual claims that MarkWest was awarded damages against JFA for property damage to the Project, and damages due to lost profits, business interruption i.e. delays, etc., are "insured peril" under Section 5.07 of the JFA-Redstone contract, and JFA is required to waive, and to cause MarkWest to waive, any claims against Redstone for those claims. The Circuit Court abused its discretion by ignoring this plain, unambiguous, contractual language and failing to give it full force and effect to bar damages against Redstone for claims that JFA has insurance for; i.e., all of the damages awarded in this case against JFA.

Sixth Assignment of Error

1. Did the Circuit Court err by awarding MarkWest delay damages?
2. Why the Court should review this issue: The Circuit Court conducted extensive analysis of the majority of MarkWest's delay damages claims, and found that MarkWest was

responsible for some of the damages for failure to coordinate amongst multiple prime contractors and subcontractors. MarkWest did not delegate the coordination responsibility. The wall project that Redstone worked on was not to generate profit. It was for waste disposal of fill material generated nearby in other activities by MarkWest, including preparation of a building site for a natural gas processing plant, the fifth such plant on the site.

The evidence clearly showed at trial that the fifth plant was significantly and concurrently delayed by MarkWest, and by others, regardless of progress by Redstone on the wall project. The only delay damage that the Circuit Court found Redstone responsible for was \$1,458,342.35 in “lost profits” for this plant. Redstone asserts that there was insufficient underlying evidence for this finding, and that MarkWest, and/or other contractors employed by MarkWest, and/or JFA and Amec, were responsible for the delay. Redstone asserts that this delay damage should not have been awarded against it by the Circuit Court.

Seventh Assignment of Error

1. Did the Circuit Court err by ignoring Redstone’s claims against MarkWest?
2. Why the Court should review this issue: Redstone brought affirmative claims against MarkWest for unjust enrichment and *quantum meruit*. Those claims were not addressed in the Judgment Order. Redstone asserts that the Circuit Court abused its discretion by failing to adjudicate the claims and failing to award Redstone damages for the additional work performed.

Eighth Assignment of Error

1. Did the Circuit Court err by granting MarkWest’s Motion to Dismiss Redstone’s “Failure to Coordinate” claim?
2. Why the Court should review this issue: Coordination is a critical element of construction projects, and construction litigation. There is minimal West Virginia law addressing

coordination, and whether a claim for failure to coordinate may be asserted. Redstone seeks to have the Circuit Court's "Order Granting in Part and Denying in Part Plaintiff's Motion to Dismiss Defendant Redstone International, Inc.'s Counterclaims Against MarkWest," entered May 7, 2019, which dismissed Redstone's "Failure to Coordinate" claim reversed. Redstone asserts there is a good faith basis for new law, or a change of existing law, for coordination claims in West Virginia. Numerous other states allow such claims, and the Circuit Court found in the Judgment Order that MarkWest was responsible for coordination on the project, because it was not designated or delegated to anyone else, and that MarkWest caused delays due to failures to coordinate.